
(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

)	
In re:)	
)	
West Suburban Recycling and)	PSD Appeal Nos. 95-1
Energy Center, L.P.)	& 96-1
)	
PSD Permit No. 94100001)	
)	

[Decided December 11, 1996]

REMAND ORDER

***Before Environmental Appeals Judges Ronald L. McCallum,
Edward E. Reich and Kathie A. Stein.***

**WEST SUBURBAN RECYCLING AND
ENERGY CENTER, L.P.**

PSD Appeal Nos. 95-1 & 96-1

REMAND ORDER

Decided December 11, 1996

Syllabus

By earlier order, the Board granted review of two petitions filed by West Suburban Recycling and Energy Center, L.P. (WSREC), in which WSREC sought review of two decisions of the Illinois Environmental Protection Agency (IEPA) denying WSREC a permit to construct a municipal solid waste facility. Although IEPA's denial decisions were premised on grounds relating only to state air permitting requirements, the Board concluded that the decisions also operated to deny WSREC a federal permit applied for pursuant to the Clean Air Act's Prevention of Significant Deterioration (PSD) program, 42 U.S.C. § 7470 *et seq.* Illinois does not have a federally approved State Implementation Plan for the PSD program; IEPA administers the federal PSD program in Illinois pursuant to a Delegation Agreement with U.S. EPA Region V. Because IEPA represented to the Board that it had identified no federal PSD deficiencies in WSREC's applications, the Board ordered IEPA to show cause as to why it should not be required to issue, in accordance with 40 C.F.R. Part 124, the federal PSD permit sought by WSREC.

In response to the Board's order, the Board has received briefs and argument from IEPA and WSREC, as well as from several *amici curiae*, including Region V joined by U.S. EPA's Office of General Counsel. IEPA now requests that the Board abstain from exercising its jurisdiction over the PSD component of WSREC's applications, because of the pendency of appeals filed by WSREC under state law with the Illinois Pollution Control Board (IPCB) concerning IEPA's denial decisions. Alternatively, IEPA argues that its denial decisions were an appropriate exercise of the federal PSD authority delegated to it by Region V. IEPA and some *amici* contend that one basis for denying the permit under state law (an alleged discrepancy in source size between the source identified in the construction permit application and the source described by WSREC in obtaining local siting authorization) would also constitute grounds for denying the permit under federal PSD regulations. Some *amici* request that the Board remand the permit to IEPA for completion of its PSD decisionmaking responsibilities.

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Held: The Board will not abstain from exercising its jurisdiction, because the doctrine of abstention, as advanced by IEPA, is inapplicable to this proceeding. As Region V's delegatee, IEPA "stands in the shoes" of the Region for purposes of the federal PSD program. The Board has sole administrative authority for review of federal PSD permit decisions, and the PSD issues involved in this proceeding are easily severable from the state-law challenges WSREC has raised before the IPCB. Therefore, there is virtually no potential for the federal-state entanglement that must exist before abstention becomes appropriate.

The Board rejects IEPA's claim that its denial decisions (premised solely on state law) were a proper exercise of its delegated responsibilities under the federal PSD program. The Delegation Agreement requires IEPA to apply federal source review provisions and federal permit issuance procedures to the PSD component of WSREC's applications. The Board agrees that a potential discrepancy between the source described in a PSD permit application and the source which the applicant actually intends to build may be relevant to review of a federal PSD permit application, but IEPA's denial decisions did not address the relevance of the alleged discrepancy to the federal PSD program, and did not include any of the elements required under the PSD permit decisionmaking process set forth in 40 C.F.R. Part 124, such as a final PSD permit decision that sets forth the procedures for appealing a PSD permit decision, and a response to public comments. On the basis of the record before it, the Board concludes that IEPA has failed to complete the federal PSD permit decisionmaking responsibilities delegated to it by Region V. The Board therefore remands this matter to IEPA, and orders IEPA to expeditiously complete the federal PSD permit process by issuing a final decision granting or denying the PSD component of WSREC's applications, as well as a response to comments received concerning PSD issues and an explanation of changes, if any, between the draft permit issued by IEPA and any final permit issued. The Board expresses no opinion with respect to the substance of the final PSD permit decision to be issued by IEPA.

***Before Environmental Appeals Judges Ronald L. McCallum,
Edward E. Reich and Kathie A. Stein.***

Opinion of the Board by Judge McCallum:

These appeals are before the Board following an order issued by the Board on April 26, 1996, granting two petitions for review filed by West Suburban Recycling and Energy Center, L.P. (WSREC), and requiring the Illinois Environmental Protection Agency (IEPA) to show cause as to why it should not be required to issue a Clean Air Act Prevention of Significant Deterioration (PSD) permit decision on two pre-construction permit applications submitted to it by WSREC, in

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accordance with the rules set forth at 40 C.F.R. § 124 *et seq.*¹ As explained in more detail below, the show cause order consolidated two petitions for review, filed by WSREC pursuant to 40 C.F.R. § 124.19, seeking review of two decisions of IEPA denying WSREC a state permit to construct a municipal solid waste combustion facility. In the show cause order, the Board concluded that IEPA's decisions also operated to deny WSREC a permit under the federal PSD program, Clean Air Act Title I, Part C, 42 U.S.C. § 7470 *et seq.* In response to the show cause order and the public notice published by IEPA pursuant to 40 C.F.R. § 124.19(c), the Board has received numerous briefs filed by the parties as well as amici curiae.²

¹The April 26, 1996 order is referred to herein as the "show cause order".

²Specifically, the Board has received the following: IEPA's Response to Show Cause Order (filed June 17, 1996); WSREC's Reply to IEPA's Response to Show Cause Order (filed July 2, 1996); Amicus Brief of Lyons Incinerator Opponent Network (LION) (filed July 10, 1996); WSREC's Motion for Leave to File Response to Amicus Brief of LION, together with proposed Response (filed July 24, 1996); LION's Motion for Leave to File Reply to WSREC's Response, together with proposed Reply (filed August 2, 1996); Motion of U.S. EPA Office of General Counsel (OGC) and U.S. EPA Region V for Leave to File Amicus Brief in Response to Show Cause Order (filed August 6, 1996), and OGC and Region V's Response to Show Cause Order (received July 30, 1996); WSREC's Objection to OGC and Region V's Motion for Leave to File Amicus Brief, or in the Alternative, Motion for Leave to File Response to Amicus Brief, together with proposed Response (filed August 14, 1996). In addition, the Board received several letters from citizens and a member of the U.S. Congress generally supporting IEPA's decisions denying WSREC's permit (although some letters concerned issues unrelated to WSREC's permit application). In the interest of having all of the parties' and amici's views before it, the Board hereby grants the above-described motions, and the above-described briefs and letters are accepted as part of the Board's record. The Board notes that WSREC opposes the filing of an amicus brief by OGC and Region V, on the ground that the brief was not timely filed. We disagree. The public notice announcing that the Board would accept amicus briefs (prepared by IEPA and published in mid-June 1996) did not specify a particular deadline by which such briefs must be filed. Moreover, WSREC has been afforded an opportunity to respond to the matters raised in the OGC/Region V amicus brief, and therefore has suffered no prejudice as a result of its filing.

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Upon consideration of the record before the Board, and for the reasons set forth below, the Board concludes that IEPA has failed to fulfill the PSD permit decisionmaking responsibilities delegated to it by U.S. EPA Region V with respect to the permit applications underlying WSREC's petitions for review. In particular, although IEPA's permit decisions operated to deny WSREC a federal PSD permit, those decisions did not comport with the permit decisionmaking procedures set forth at 40 C.F.R. part 124. The Board is therefore requiring IEPA to complete the PSD permit decisionmaking process, in accordance with the federal authority delegated to it. In particular, IEPA must issue a final permit decision relative to the grant or denial of the PSD component of WSREC's permit applications. *See* 40 C.F.R. § 124.15(a). Further, IEPA must issue a response to all significant comments concerning the PSD component of WSREC's application that were previously received during the public comment period and public hearing held by IEPA following issuance of its draft permit decision, and IEPA must explain changes, if any, between the previously issued draft permit decision and the final permit decision issued pursuant to this remand order, in accordance with 40 C.F.R. § 124.17. In accordance with 40 C.F.R. § 124.18, IEPA's response to comments and any documents referenced therein shall become part of the administrative record. The Board expresses no opinion with respect to the substance of the final PSD permit decision to be issued by IEPA. IEPA shall issue its final PSD permit decision and response to comments expeditiously.³

³OGC and Region V point out that IEPA has already greatly exceeded the time allowed (180 days) under its Delegation Agreement with Region V for making a permit decision, and that WSREC has not waived the time limit imposed by the Delegation Agreement (which it may do under the terms of the Delegation Agreement). OGC/Region V Amicus Brief at 8. OGC and the Region also represent that "[i]f IEPA fails to complete the PSD permit review within a suitable period of time, the Regional Administrator should determine whether it is appropriate to revoke the delegation for this permit review and make a final decision to grant or deny the PSD permit." *Id.* at 29. OGC and the Region do not suggest what a "suitable" period of time might be. It will be the Region's obligation to closely monitor the proceedings on remand, and take appropriate action if they are not completed (continued...)

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I. BACKGROUND

In April 1980 the Regional Administrator of U.S. EPA Region V delegated full authority to the State of Illinois to implement and enforce the federal PSD program. *See Prevention of Significant Deterioration; Delegation of Authority to State Agencies*, 46 Fed. Reg. 9580 (Jan. 29, 1981) (setting forth Delegation Agreement between State of Illinois and U.S. EPA). The Delegation Agreement expressly delegates to Illinois the "administrative, technical and enforcement elements of the source review provisions of 40 C.F.R. § 52.21 [Prevention of Significant Deterioration]." *Id.* In turn, 40 C.F.R. § 52.21 obligates Illinois to "follow the applicable procedures of 40 C.F.R. part 124 in processing applications under this section." *See* 40 C.F.R. § 52.21(q).⁴

On July 5, 1994, WSREC submitted an application to IEPA for a permit to construct a municipal solid waste combustion facility. In accordance with Illinois law, which provides for integrated permit review when a facility must obtain construction approval under various state and federal requirements, WSREC submitted a single permit application addressing both state and federal requirements.

³(...continued)

expeditiously. Given the length of time that has elapsed since WSREC submitted its PSD permit applications (the most recent was submitted in May 1995), the proceedings that have already been completed by IEPA, and the Delegation Agreement's provision that "IEPA will take final action upon a complete application * * * within 180 days of receipt," we would expect that the proceedings on remand could and should be completed within 90 days of the date of this order, although we recognize the need for some flexibility in this regard.

⁴Because IEPA only exercises such PSD authority as was delegated to it by EPA, IEPA stands in the shoes of EPA for purposes of implementing the federal PSD permit program. *See* 40 C.F.R. § 124.41 (terms "EPA" and "Regional Administrator" mean the delegate agency when a State exercises delegated authority to administer PSD permit program); 45 Fed. Reg. 33,413 (May 19, 1980) ("For purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. * * * A permit issued by a delegate is still an 'EPA-issued permit'; * * *"); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26 (EAB 1994).

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Specifically, WSREC sought approval under Illinois New Source Review requirements concerning pollutants for which Illinois is deemed "nonattainment" under the Clean Air Act, as well as approval under the federal PSD program for pollutants for which Illinois is deemed "attainment".⁵

In accordance with an ongoing dialogue between WSREC and IEPA, WSREC subsequently submitted a revised application and supplements to its application. Following its consideration of WSREC's application, IEPA denied WSREC's application by letter dated February 27, 1995. Among other reasons, IEPA denied the application for failure to demonstrate compliance with certain requirements of Illinois law, including a demonstration of "best available control technology" (BACT), "lowest achievable emission rate" (LAER), and compliance with emissions offset requirements for certain pollutants regulated under Illinois State Implementation Plan (SIP) requirements for

⁵Pursuant to Parts C and D of the Clean Air Act, 42 U.S.C. §§ 7470-7515, the New Source Review (NSR) program requires new major stationary sources of air pollution and major modifications to such sources to be permitted prior to construction. Under Part D of the Clean Air Act, "nonattainment areas" are those that do not meet the National Ambient Air Quality Standards (NAAQS) for certain pollutants. Permits issued in such areas are generally known as NAA or NSR permits, and most NAA or NSR permits are issued by states in accordance with State Implementation Plans (SIPs) approved by EPA pursuant to the Clean Air Act. Illinois' SIP with respect to the nonattainment requirements of Part D was approved by U.S. EPA, and accordingly Illinois is fully authorized to implement and enforce the nonattainment new source permit requirements of its SIP. See 40 C.F.R. § 52.722 (setting forth SIP approval status). In contrast, under Part C of the Clean Air Act, "attainment areas" are areas where the NAAQS are met for certain pollutants, and a new source must demonstrate compliance with Prevention of Significant Deterioration (PSD) requirements in order to obtain a permit. The Illinois SIP has not been approved with respect to a PSD program, and therefore the federal PSD program remains in force and effect in Illinois. See 40 C.F.R. § 52.738(a) ("The requirements of [Part C] of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality."). As explained *supra*, U.S. EPA Region V delegated its authority to issue permits in accordance with the federal PSD program to the State.

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nonattainment area pollutants.⁶ IEPA's February 27, 1995 denial letter did not reference any failure by WSREC to comply with federal PSD requirements. On March 29, 1995, WSREC filed PSD Appeal No. 95-1 with the Board, seeking review of IEPA's denial of its permit application.⁷ In its petition, WSREC contends, *inter alia*, that IEPA "failed to comply with the applicable federal regulations governing IEPA's PSD permit decisionmaking process." PSD Appeal No. 95-1 at 8-9. WSREC also sought review before the Illinois Pollution Control Board.⁸

Following discussions with IEPA, WSREC submitted a second construction permit application for the same project (again addressing both state and federal requirements) on May 19, 1995.⁹ In September 1995, IEPA issued a draft permit decision and public notice indicating that IEPA was proposing to issue a permit to WSREC, including approval to construct under the federal PSD program. IEPA accepted

⁶The "BACT" review referred to in IEPA's denial letter concerned only pollutants regulated pursuant to the Illinois SIP (dioxin/furans and mercury), but not pursuant to federal PSD requirements. See Clean Air Act § 112(b)(6), 42 U.S.C. § 7412(b)(6) (excluding dioxin/furans and mercury from federal PSD requirements); see also *In re Robbins Resource Recovery Co.*, 3 E.A.D. 648, 653 (Adm'r 1991).

⁷WSREC specifically sought review of IEPA's decision concerning WSREC's BACT analysis for dioxin/furans and mercury, as well as contending that IEPA had not followed applicable regulatory requirements in processing the federal PSD component of WSREC's permit application. See Petition No. 95-1 at 8-18. As explained *supra* note 6, dioxin/furans and mercury are not regulated under the federal PSD program, and therefore that aspect of IEPA's permit denial is not reviewable before the Board. See *In re Spokane Regional Waste-to-Energy Project*, 3 E.A.D. 68, 70 (Adm'r 1990); *In re Robbins Resource Recovery Co.*, 3 E.A.D. 648, 653 (Adm'r 1991).

⁸On October 17, 1996, the Illinois Pollution Control Board affirmed IEPA's decision denying a state construction permit to WSREC.

⁹IEPA states that "[i]n the second construction permit application, WSREC cured the deficiencies identified in the IEPA's February 27, 1995 denial." IEPA Response to Show Cause Order at 3, 39 n.32.

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comments from the public on the draft permit, and held a public hearing on the draft permit in November 1995. In the notice for the public hearing, IEPA stated that the application satisfied certain air pollution control laws, including the federal PSD rules. *See* IEPA's "Notice of Proposed Issuance of a Construction Permit" (attached as Exhibit B to Petition No. 96-1). On December 22, 1995, IEPA denied the second application. The basis for the denial concerned WSREC's alleged failure to obtain necessary local siting approvals for the facility described in the permit application. In particular, IEPA's denial stated that "the application does not demonstrate that the facility for which a permit has been applied is the pollution control facility for which approval was granted" pursuant to local siting requirements. IEPA Denial Letter (Dec. 22, 1995). IEPA's December 22, 1995 denial letter did not reference any failure by WSREC to comply with federal PSD requirements. On January 11, 1996, WSREC filed PSD Appeal No. 96-1 with the Board, seeking review of IEPA's second permit denial. WSREC also sought review of the second denial before the Illinois Pollution Control Board.¹⁰

On January 19 and February 21, 1996, IEPA moved the Board to dismiss PSD Appeal Nos. 95-1 and 96-1, respectively. As grounds for its motions, IEPA argued that the Board lacks jurisdiction to consider WSREC's petitions, because IEPA's denials were based entirely on WSREC's alleged failure to comply with state requirements. The Board rejected IEPA's argument, and denied the motions to dismiss. The Board held that:

The part 124 regulations confer upon this Board the authority to review "any condition of [a final PSD] permit decision." 40 C.F.R. § 124.19(a). Pursuant to the part 124 rules, "final permit decision" includes a final decision to deny a permit. *Id.* § 124.15(a).

¹⁰To date, the Illinois Board has not issued a decision with respect to WSREC's second appeal.

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It is apparent that IEPA's denials, although premised on state-law grounds, operated to deny the permit applications in their entirety, including the federal PSD portion. As explained above, the Board has jurisdiction to consider any condition of a final PSD permit decision, including a decision to deny a permit. 40 C.F.R. §§ 124.15(a) & 124.19(a). While the Board does not have jurisdiction to address the substance of IEPA's denials as they affect WSREC's rights under state law, *see In re Spokane Regional Waste-to-Energy Project*, 3 E.A.D. 68, 70 (Adm'r 1990), the rules do confer upon the Board the authority to entertain WSREC's claim that IEPA has erroneously refused to issue it a federal PSD permit when all federal requirements have apparently been met. We therefore deny IEPA's motions to dismiss WSREC's petitions for review.

Show Cause Order at 8.¹¹ Because, in the course of pursuing its motions to dismiss, IEPA represented to the Board that it did not deny the permit requested by WSREC on the basis of WSREC's failure to comply with federal PSD regulations, and because IEPA took pains to represent to the Board that it had, in fact, identified no federal PSD-related deficiencies in the permit application, the Board granted WSREC's petitions for review of IEPA's denial decisions, and ordered IEPA to show cause as to why it should not be required to issue, in accordance with the governing regulations at 40 C.F.R. Part 124, the PSD permit. *Id.* at 9-11 (citing IEPA's Reply to WSREC's Response to

¹¹IEPA now concedes that its denial decisions operated to deny the federal PSD component of the permit applications, and has abandoned its challenge to the Board's jurisdiction over WSREC's petitions for review. IEPA's Response to Show Cause Order at 4-5, 6 n. 10.

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IEPA's Motion to Dismiss at 5-6 (April 10, 1996)).¹² The order further required IEPA to publish a public notice of the Board's grant of review, advising the public that the Board would accept amicus briefs from interested persons. *Id.* at 11.¹³

IEPA submitted a lengthy response to the show cause order. IEPA's response urges two alternative courses of action upon the Board. First, IEPA requests that the Board "abstain" from exercising its jurisdiction to review WSREC's petitions until the Illinois Pollution Control Board (IPCB) has completed its review of WSREC's state appeals. Second, IEPA urges the Board in the alternative to "affirm the IEPA's permitting determinations made pursuant to its delegated authority under the federal [PSD] provisions of the Clean Air Act[.] " IEPA's Response to Show Cause Order (hereafter "IEPA Response") at 1-2. The basis for IEPA's abstention request is its claim that WSREC's petitions "involve[] the complex interrelationship between State and federal law and bear[] upon the IEPA's future administration of the [Clean Air Act] and State permitting programs. " *Id.* at 5. IEPA argues

¹²In its oppositions to IEPA's motions to dismiss, WSREC provided the Board with testimony from the proceeding before the Illinois Pollution Control Board in which a representative of IEPA testified that the federal PSD component of WSREC's permit application had been "internally approved" by IEPA. See WSREC's Supplemental Response to IEPA's Motion to Dismiss at 3-4 (March 5, 1996). Although IEPA contended that the testimony was not relevant to the Board's deliberations, IEPA provided the Board with additional testimony from the State proceeding in which a representative of IEPA testified to having found no federal PSD deficiencies in WSREC's application. See IEPA's Reply to WSREC's Response to IEPA's Motion to Dismiss at 5-6 (April 10, 1996).

¹³The rules governing review of PSD permit decisions require public notice of a grant of a petition for review. 40 C.F.R. § 124.19(c). The rule provides that "[p]ublic notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief." *Id.*

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that the issues raised by WSREC before the IPCB are "deeply entwined in the issues being considered" by the Board. *Id.*¹⁴ IEPA contends that:

[T]he exercise of jurisdiction by the [Board] could seriously disrupt the administration of environmental permitting programs by the IEPA if doing so results in an order requiring the IEPA to bifurcate its review of permits involving both federal PSD and other CAA and state air quality issues, particularly if the programs involve[d] impose separate procedural requirements and review procedures.

Id. at 13. IEPA relies particularly on the abstention doctrines elucidated by the U.S. Supreme Court in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976).¹⁵

As to its alternative course of action, IEPA contends that its denial of WSREC's permit applications for reasons relating to state law requirements is not inconsistent with the federal PSD rules or the

¹⁴As noted *supra*, note 8, the Illinois Board affirmed IEPA's February 27, 1995 decision denying a state construction permit to WSREC. IEPA argued in its abstention request that "[i]f the IEPA secures a judgment in its favor, the [Board] will be able to consider WSREC's claims regarding the propriety of the IEPA's denial of its PSD permit application." IEPA Response at 6. Therefore, IEPA's abstention request appears to be moot with respect to Petition No. 95-1. However, no decision has been rendered with respect to WSREC's second state appeal, and therefore IEPA's abstention request is not moot with respect to Petition No. 96-1.

¹⁵As explained in more detail below, the *Burford* doctrine requires a federal court to decline to exercise its equitable powers to interfere with a state's regulatory proceedings when timely and adequate state-court review is available, and to exercise such powers would potentially implicate difficult questions of state law or policy. See *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. at 359. The *Colorado River* doctrine allows a federal court, in limited circumstances, to decline to exercise its jurisdiction for reasons of judicial economy when a parallel proceeding is pending in a state forum. See *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. at 817-18.

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Illinois PSD Delegation Agreement with EPA. Although IEPA's arguments are somewhat unclear, the essence of its claim is that the Delegation Agreement grants IEPA the authority to apply the state integrated permit review provisions contained in the Illinois SIP to applications for federal PSD permits. According to IEPA, because the provisions of Illinois law incorporated in the SIP prevent it from issuing a permit that does not demonstrate compliance with all applicable state requirements, it was within its delegated authority to deny a federal PSD permit to WSREC for failure to demonstrate compliance with requirements imposed by Illinois New Source Review regulations (the first denial decision). *See id.* at 29-32, 40-47. IEPA contends that it was similarly within its delegated authority to deny a federal PSD permit to WSREC for failure to comply with local siting requirements (the second denial decision). *See id.* at 47-53.

In its reply to IEPA's Response, WSREC argues that the federal abstention doctrines relied upon by IEPA are inapplicable because the Board is not an Article III federal court with wide-ranging equitable powers, but only has the authority to exercise the jurisdiction conferred on it by regulation to review permit appeals and render EPA's final decision on those appeals. As such, in WSREC's view, "this Board does not risk excessive entanglement with state proceedings by the potential exercise of equitable powers." WSREC's Reply to IEPA's Response to Show Cause Order at 3-4 (hereafter "WSREC's Reply"). WSREC further argues that even if the Board has the authority to abstain from exercising its jurisdiction "there are no state issues of law or policy which could possibly be affected by the [Board's] ruling here," because the Board's jurisdiction concerns only the federal PSD issues raised by WSREC, and therefore *Burford* abstention is inappropriate. *Id.* at 4. Nor, in WSREC's view, is *Colorado River* abstention appropriate, because there is no "parallel" state proceeding, since WSREC's state appeals raise no federal PSD issues. *Id.* at 12-13.

WSREC also disputes IEPA's claim that it has the authority pursuant to the Clean Air Act, the Illinois SIP, and the Delegation Agreement to deny a federal PSD permit for alleged permit deficiencies

arising only under state law. *Id.* at 18-19. WSREC contends that IEPA's claim is:

[E]xtraordinary, and without basis in fact or in law. Taken to its logical end point, the IEPA asks this Board to conclude that by mere virtue of being a delegated agency under the federal PSD program, the IEPA may deny a PSD permit for any reason (or no reason) at all. According to the IEPA, any purported deficiency in a state construction permit application bars issuance of the federal PSD permit simply because IEPA processes all applications at once under its "integrated" state construction permit program.

This is simply not the law * * *.

Id. WSREC urges the Board to order IEPA to immediately issue WSREC's PSD permit, which it says IEPA has admitted to approving. *Id.* at 31.

II. DISCUSSION

A. Abstention

We first consider IEPA's request that the Board abstain from exercising its jurisdiction over these petitions because of the pendency of WSREC's appeal before the IPCB. We need not decide if the Board possesses the power to abstain from exercising its jurisdiction in an appropriate case, because we conclude that the doctrine as advanced by IEPA is inapplicable to the case at bar; therefore, we must reject IEPA's request.¹⁶

¹⁶The "abstention doctrine" has been succinctly defined as permitting "a federal court, in the exercise of its discretion, to relinquish jurisdiction where necessary to avoid needless conflict with the administration by a state of its own affairs." Black's Law (continued...)

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Abstention, as construed by the Supreme Court, applies only in limited circumstances. The Supreme Court has explained that "[w]e have carefully defined * * * the areas in which * * * 'abstention' is permissible, and it remains 'the exception, not the rule.' * * * [T]he federal courts' obligation to adjudicate claims within their jurisdiction [is] 'virtually unflagging.'" *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (citation omitted) (hereafter cited as "*NOPSI*"); *Colorado River Water Conservation Dist.*, 424 U.S. at 813 ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.") (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)). It is unnecessary to engage in lengthy discourse concerning the types of cases or circumstances in which the Board might abstain from exercising its jurisdiction, because the threshold elements necessary to consider abstention under either *Burford* or *Colorado River* are wholly lacking in this case.

¹⁶(...continued)

Dictionary, 5th ed. OGC and Region V state that "we believe that the Board has equitable authority to grant such a request when circumstances warrant. Such circumstances may exist where pending, parallel state proceedings addressing the same or similar issues are expected to be completed in the near term." OGC/Region V Brief at 17. We note that the Board has, in this case and in other cases, *stayed* consideration of an appeal where, for example, the parties were engaged in settlement negotiations and jointly requested such a stay. The issue of whether the Board has the power to "relinquish", or to decline to exercise, its jurisdiction solely because an exercise of jurisdiction would allegedly interfere with related state proceedings has not, to our knowledge, previously been raised. Because we conclude that the doctrine would not, in any event, be applicable to this case, it is unnecessary for us to decide whether we possess such power.

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The Supreme Court has explained the *Burford* doctrine as follows:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

NOPSI at 361 (quoting *Colorado River*, 424 U.S. at 814). The *Colorado River* doctrine, under which a court may decline to exercise jurisdiction for reasons of judicial economy when there is a pending state proceeding, is even more narrow; the Court has explained that "[g]iven * * * the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." *Colorado River* at 817-18. Moreover, the *Colorado River* doctrine depends upon the existence of a "parallel" state proceeding; that is, one in which "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *LaDuke v. Burlington Northern Co.*, 879 F.2d 1556, 1558-59 (7th Cir. 1989); see *Colorado River* at 817-18.

WSREC's petitions for review before this Board and the pendency of its remaining appeal before the IPCB raise none of the concerns underlying the *Burford* or *Colorado River* doctrines, and IEPA's protestations to the contrary apparently stem from a misinterpretation of its obligations under the PSD Delegation

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Agreement, and the scope of this Board's authority to review its PSD permit decisions. As explained *supra*, notes 4-5, IEPA's authority to review PSD permit applications stems solely from its Delegation Agreement with Region V. The State of Illinois does not have an approved SIP for the PSD program, and therefore IEPA acts only to implement *federal* PSD requirements. The Delegation Agreement makes plain that IEPA was delegated *only* "authority for the administrative, technical and enforcement elements of the source review provisions of 40 C.F.R. § 52.21." 46 Fed. Reg. 9580. Although the Delegation Agreement allows IEPA to conduct its federal PSD permit review "as an integral part of the Illinois construction permit program," *see id.*, nothing in the Delegation Agreement alters the fact that the federal substantive PSD regulations and the federal procedures for processing PSD permit applications apply to the PSD component of any "integrated" application that IEPA may review. *See id.*; 40 C.F.R. § 52.21(q) & part 124; 45 Fed. Reg. 33,413 (May 19, 1980) ("For purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124."). In the same vein, in accordance with the federal regulations, review of IEPA's PSD permit decisions must be had in accordance with the procedures set forth at 40 C.F.R. § 124.19, which vest sole authority to review such decisions in the Board. *See* 40 C.F.R. § 124.19(a); *In re Robbins Resource Recovery Co.*, 3 E.A.D. 648, n.2 (Adm'r 1991) ("Because of the delegation, IEPA's authority to issue PSD permits is subject to the review provisions of 40 C.F.R. § 124.19, and any permit it issues will be an EPA issued permit for purposes of federal law.").¹⁷

¹⁷WSREC points out that there are significant disparities in the federal PSD permit review requirements and the state construction permit program. *See* WSREC Reply at 30 (noting that federal and state programs have different requirements concerning what decisions may be appealed, when public notice of a proposed decision is required, the extent of public participation in the process, and issuance of permits by default). Although we need not reach the issue of the nature and extent of such disparities, we do note that it is the federal PSD regulations, not the provisions of Illinois law, that apply here.

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In light of the foregoing, IEPA's contention that "[a]s set forth in the [Delegation Agreement], IEPA's role in reviewing PSD preconstruction permit applications is controlled by the substantive and procedural review requirements of [Illinois law]" (IEPA Response at 35) is both inexplicable and plainly erroneous. We find nothing in the Delegation Agreement that would so expand IEPA's federal PSD permit review authority; indeed, as explained above, the Delegation Agreement plainly limits IEPA to exercising only the federal PSD authority contained in 40 C.F.R. § 52.21. To read the Delegation Agreement as IEPA suggests would be to equate IEPA's delegated PSD authority with a state PSD program that has been duly authorized by EPA as part of a state SIP. This we cannot do.

For these reasons, IEPA's claim that the Board "does not enjoy exclusive jurisdiction over the IEPA's PSD permitting decisions" is patently wrong.¹⁸ For the same reasons, the Board and its predecessors have made clear that even where a permit proceeding involves requirements under both state and federal law, the scope of the Board's review is limited to issues relating to the federal PSD program and the Board will not assume jurisdiction over permit issues unrelated to the federal PSD program. 40 C.F.R. § 124.19; *see In re Spokane Regional Waste-to-Energy Project*, 3 E.A.D. 68, 70 (Adm'r 1990); *In re American Ref-Fuel Co.*, 2 E.A.D. 280 (Adm'r 1986). In *American Ref-Fuel*, a petitioner sought review of a preconstruction PSD permit issued by the State of New Jersey. The PSD permit was one of four permits issued in a consolidated permit proceeding in which the New Jersey Department of Environmental Protection (DEP) reviewed the permit application for compliance with both state and federal requirements.

¹⁸IEPA argues that the Illinois Environmental Protection Act empowers the IPCB to review *all* IEPA permit decisions. IEPA Response at 11 n.11 (citing 415 ILCS 5/40). The provision cited by IEPA authorizes the IPCB to review IEPA permit decisions made under section 39 of the Illinois Environmental Protection Act. 415 ILCS 5/40(a)(1). Our review of section 39 of the Illinois Act indicates that it makes no specific mention of permits issued pursuant to delegated authority under the federal PSD program. *See* 415 ILCS 5/39.

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Like Illinois, New Jersey had an approved SIP with respect to Clean Air Act nonattainment requirements, but exercised only delegated authority with respect to the federal PSD program. On appeal, the Administrator expressly refused to consider a request for review of a permit condition relating to New Jersey nonattainment requirements. Although the petitioner argued that its challenge to the permit's nonattainment requirements were related to the permit's attainment (PSD) requirements, the Administrator stated:

Without disputing the existence of such a relationship, I do not believe that it is sufficiently strong to warrant federal intrusion into what Congress, upon EPA's approval of New Jersey's SIP for nonattainment areas, clearly intended as a State matter. Congress expressed its intent, in section 101(a)(3) of the Clean Air Act, that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments"; therefore, absent special circumstances, EPA should not risk undermining that intent by second-guessing the state's new source determination under the guise of reviewing a PSD permit. * * *

The [nonattainment] issue * * * is easily severed from the PSD determination. * * * [D]espite the existence of a nexus between the PSD and non-PSD provisions of the [Clean Air] Act, EPA can keep them two separate in this instance for purposes of review under 40 C.F.R. § 124.19, while also accommodating the important congressional goal of placing primary responsibility for clean air in the hands [of the] State.

American Ref-Fuel, 2 E.A.D. at 283.

Because IEPA's PSD permit decision is easily severable from the state-law based challenges WSREC has raised to the denial

decisions, and because authority to review the PSD component of those decisions rests solely with the Board, there is virtually no potential for the federal-state entanglement complained of by IEPA, and that must exist before the *Burford* and *Colorado River* doctrines become applicable. Further, because of the clear dichotomy of review authority, there can be no "timely and adequate state-court review" of WSREC's federal PSD permit; and thus the *Burford* doctrine is inapplicable. See *NOPSI* at 361. WSREC's appeals before the IPCB are plainly not "parallel" to this proceeding, because this is the only forum in which WSREC's PSD appeals may properly be considered, and thus the same issues cannot be properly adjudicated by the IPCB. See *La Duke v. Burlington Northern*, 879 F.2d at 1559.¹⁹ We therefore reject IEPA's request that the Board abstain from considering WSREC's petitions for review.²⁰

B. IEPA's Denial Decisions

¹⁹We have reviewed the abstention cases relied on by IEPA in its argument, and find them to be inapplicable to the present proceeding. For example, IEPA relies substantially on *Sugarloaf Citizens Ass'n v. Montgomery County*, 33 F.3d 52 (table), 1994 U.S. App. LEXIS 21985 (4th Cir. 1994), an unpublished decision. That case involved the grant of a state air permit that was appealed by a citizens' association to state court. Within a few days after filing the state appeal, the association filed a federal court collateral challenge to the same permit under the Clean Air Act's citizen suit provisions, raising the very same allegations as in the state proceedings. See *Sugarloaf*, 1994 U.S. App. LEXIS at *4-*5. The district court applied the *Burford* doctrine, abstained in favor of the pending state proceeding, and dismissed the complaint. *Id.* at *6. The Fourth Circuit affirmed the district court's abstention. *Id.* at *25-*26. Plainly, none of the circumstances warranting *Burford* abstention in the *Sugarloaf* case are present here, where this Board, not the IPCB, has exclusive authority to review IEPA's federal PSD permit decisions.

²⁰Our rationale for refusing to abstain in these appeals appears to have been borne out in the IPCB decision rendered on October 17, 1996. Our review of that decision indicates that the IPCB did not in any fashion consider or address federal PSD issues in that appeal.

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In support of its motions to dismiss, IEPA vigorously argued to the Board that its denial decisions did not in any respect relate to the federal PSD program, and that it had in fact identified no deficiencies in the PSD component of WSREC's application. *See* Show Cause Order at 9-10; IEPA's Reply to WSREC's Response to IEPA's Motion to Dismiss at 5-6 (April 10, 1996). IEPA now argues that its denial decisions were an appropriate exercise of its delegated PSD authority. *See, e.g.* IEPA Response at 38. In support of its argument, IEPA engages in lengthy discourse concerning the state/federal balance of authority under the Clean Air Act, the permit review provisions and requirements of the Illinois SIP, and its interpretation of the Delegation Agreement. *See* IEPA Response at 18-38. It is this latter interpretation upon which IEPA relies in defending its denial of a federal PSD permit for reasons relating only to state law requirements, and we will therefore focus on that aspect of IEPA's argument.

As noted above, the Delegation Agreement provides that IEPA will conduct its delegated federal PSD permit review authority "as an integral part of the Illinois construction permit program." 46 Fed. Reg. 9580. IEPA contends that this phrase "clearly contemplated [State law permitting requirements] as part of the 'integral' permitting scheme incorporated into the IEPA's PSD permitting review." IEPA Response at 32. IEPA relies on principles of state contract law to interpret the Delegation Agreement as allowing IEPA to deny a federal PSD permit in instances where IEPA would deny a permit because an application failed to demonstrate compliance with, for example, Illinois NSR requirements. *See id.* at 32-36. In sum, IEPA claims that "USEPA has essentially instructed IEPA to perform its delegated PSD authority in a manner consistent with the Illinois statutes and rules that implement the SIP." *Id.* at 37.

IEPA's interpretation of the Delegation Agreement is unsupported by the plain terms of the document.²¹ While the Delegation Agreement does allow IEPA to conduct its delegated PSD review authority as "an integral part of the Illinois construction permit program," nothing in that phrase can be reasonably read as abrogating the delegatee's responsibility to conduct its review and make its decisions *on the basis of the federal PSD program contained in 40 C.F.R. § 52.21*. Rather, the Delegation Agreement expressly requires IEPA to apply the source review provisions of 40 C.F.R. § 52.21, which in turn encompass the permit issuance procedures of 40 C.F.R. Part 124. We have explained that a permit issuer exercising delegated PSD permit authority only "stands in the shoes" of U.S. EPA. Obviously, U.S. EPA would not be free to deny a federal PSD permit solely on the basis of failure to comply with state permitting requirements.²² Therefore, IEPA may not do so.

IEPA expresses dissatisfaction that the result of the Board's interpretation of the Delegation Agreement will be a cumbersome, bifurcated permit review involving separate permit review procedures. As WSREC points out (*see* WSREC's Reply at 20), the fact is that Illinois does not currently have a SIP authorization to administer the federal PSD program, so, to the extent that the programs differ, there is some inevitable duality in its administration of state permit programs and exercise of delegated authority to administer the federal PSD

²¹We note that the amicus brief of OGC and Region V did not address this part of IEPA's argument, but instead appears to (correctly) assume that permit denial decisions under state law do not automatically constitute grounds for denying a federal PSD permit.

²²The PSD regulations provide that "[a]pproval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the State implementation plan and any other requirements under local, State or Federal law." 40 C.F.R. § 52.21(r)(3). Conversely, the potential that a permittee may not be able to construct a proposed facility because it fails to fulfill state or local requirements unrelated to the PSD program does not provide a basis for the Agency to refuse to issue a federal permit where the permittee has demonstrated compliance with federal requirements. *See, e.g., In re Beckman Production Serv.*, 5 E.A.D. 10, 23 (EAB 1994).

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program. It appears that the Delegation Agreement attempts to alleviate the administrative burdens imposed by the existence of this dual system, by allowing IEPA to review PSD permit applications in conjunction with state construction permit applications. This accession to administrative convenience does not, however, diminish the importance of carrying out the PSD review obligations imposed by the Delegation Agreement in a manner that is timely and consistent with the federal PSD regulations, regardless of whether the PSD review obligations mesh perfectly with the state permit review process.²³

For the foregoing reasons, we reject IEPA's contention that the state-law grounds for its denial decisions, as articulated in the denial letters, were valid grounds upon which to deny WSREC a federal PSD permit. However, IEPA now argues that the alleged discrepancy in source size between the proposed source and the allegedly smaller source for which WSREC obtained local siting approval (which formed the basis of IEPA's second denial decision) would also provide a basis for denying WSREC a permit under the federal PSD program, although IEPA did not reference the implications for the federal PSD program in its denial letter. IEPA Response at 47-54. WSREC disagrees that any discrepancy exists, and further argues that the discrepancy alleged by IEPA would be harmless since, if true, it would mean that the air impacts analyzed in the PSD application were overestimated. WSREC Reply at 22-23 n. 11. While expressing no view on the merits of this dispute, OGC/Region V agree with IEPA that such an alleged

²³We note that this concept is embodied in the Part 124 permit review regulations. Under certain circumstances, the Part 124 regulations allow for consolidation of permit processing when an applicant seeks permits under multiple federal statutes. See 40 C.F.R. § 124.4. However, EPA may not (without the written consent of the applicant) consolidate the processing of a PSD permit with any other permit when to do so "would delay issuance of the PSD permit more than one year from the effective date of the application ***." *Id.* § 124.4(e); see Clean Air Act § 165(c), 42 U.S.C. § 7475(c) ("Any completed permit application *** to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application."). As explained *supra* note 3, IEPA agreed in the Delegation Agreement to further limit the time for making a PSD permit decision to 180 days, a limitation which WSREC has not waived.

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discrepancy may be relevant to a federal PSD permit decision, and therefore must be resolved before a lawful permit decision can be made. OGC/Region V Amicus brief at 18.²⁴

We agree that a discrepancy between the source described in a federal PSD permit application and the source which the applicant actually intends to build may be relevant in determining compliance with federal PSD requirements. *See In re CertainTeed Corp.*, 1 E.A.D. 743, 747-49, notes 11 & 12 (Adm'r 1982) (explaining that federal PSD permits and BACT determinations are "tailor-made for each pollutant emitting facility" and that PSD permit decisions must be based on detailed, accurate, and site-specific information); *In re Hibbing Taconite Co.*, 2 E.A.D. 838, 844 (Adm'r 1989) (same). The Agency has explained that "the 'case-by-case' evaluation of economic costs and energy and environmental impacts that has to be performed as part of a [federal] BACT determination is inextricably tied to a specific set of assumptions * * *." *CertainTeed Corp.*, 1 E.A.D. at 747.²⁵ However,

²⁴OGC and Region V argue that:

Statements in local siting approvals that are inconsistent with those in a PSD permit application are highly relevant in assessing whether a proposed source will actually be constructed consistent with its PSD permit, and are not merely harmless error. Among other concerns, such overestimates undermine the permitting authority's ability to ensure effective increment management. The overestimates would reserve for the proposed new source a portion of the available air quality increment that the permitting authority might otherwise allocate to other economic activity, or reserve for the benefit of the public. Thus, unresolved discrepancies about a source's design are independently reviewable under the PSD program.

OGC/Region V Brief at 19.

²⁵In *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130 (EAB 1994), the Board required a PSD permit applicant "to affirm that it is presently committed to construct the * * * facility for which it received a PSD permit," on the basis of an allegation that the
(continued...)

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as explained above, IEPA's December 22, 1995 denial letter did not in any way address whether the alleged discrepancy in source size also constituted grounds to deny WSREC a federal PSD permit. Neither of IEPA's denial decisions include any of the elements required under the PSD permit-decisionmaking process set forth in 40 C.F.R. Part 124, such as a final PSD permit decision that sets forth the procedures for appealing a PSD permit decision, *see* 40 C.F.R. § 124.15(a), and a response to comments (specifying changes, if any, between the draft and final permit and describing and responding to all significant comments), *see id.* § 124.17. Further, the response to comments and any documents referenced therein must be included in the administrative record. *See id.* § 124.18.

The issue thus becomes what remedy is appropriate in light of IEPA's failure to carry out its obligations to complete the processing of WSREC's PSD permit application and issue a PSD permit decision in accordance with the Part 124 regulations, pursuant to the Delegation Agreement. Several amici have argued that the appropriate action for the Board to take is to remand this matter to IEPA so that it can complete the PSD permit review procedures set forth at 40 C.F.R. Part 124. In particular, the Lyons Incinerator Opponent Network (LION) and OGC/Region V contend that there has been incomplete public participation with respect to IEPA's review of WSREC's permit application, because IEPA has not issued a final permit decision that addresses the merits of the PSD component of WSREC's application, including providing a description and response to all significant comments received on the draft permit, and explaining the basis for any revisions from the draft to the final permit. *See* LION Amicus Brief at 4; OGC/Region V Amicus Brief at 2-3 (citing 40 C.F.R. §§ 124.17 & 124.18). WSREC opposes a remand, on the basis that IEPA considered the merits of the PSD component of WSREC's application, and IEPA's

²⁵(...continued)

permittee had submitted a filing with the state siting board that suggested differences in design between the permitted facility and the facility described to the siting board. *See Inter-Power*, 5 E.A.D. at 142-43.

representatives have stated that IEPA "intern ally approved" it. WSREC argues that the Board should simply require IEPA to issue the applied-for PSD permit to WSREC, and "respond to public comment on PSD issues consistent with IEPA's acknowledgment that the permit should be issued." WSREC's Response to LION Amicus Brief at 5. WSREC argues that "[t]he failure by IEPA to identify any PSD deficiencies in its denial letters is an 'affirmative' decision that WSREC's application satisfied the PSD rules. Region V and [OGC's] argument that the [denial] letters are somehow not 'affirmative' ignores the governing standards of Illinois and federal permitting law." WSREC's Response to OGC/Region V Brief at 3.

Based on the record now before us, we conclude that IEPA has articulated no final PSD decision of record in this matter in accordance with all applicable requirements of the Part 124 regulations. This conclusion, combined with IEPA's claim that the alleged source-size discrepancy that formed the basis of its second denial decision could affect its analysis of the PSD component of WSREC's application, convinces us that the appropriate course is to remand this matter so that IEPA can complete the Part 124 permit decision process.²⁶ While WSREC may be correct that IEPA's denial letters would constitute affirmative determinations under state law, we cannot agree that they satisfy the Part 124 requirements as final PSD permit decisions that meet the applicable requirements of federal law. The decisions contain none of the elements necessary to show the basis and rationale for a decision on the merits of a PSD permit application. As such, they provide a wholly inadequate basis on which to review a PSD permit

²⁶OGC and Region V expressed concern that, in their view, the Board's show cause order suggested that the Board would truncate the Part 124 procedures, and assume IEPA's role by summarily issuing the PSD permit sought by WSREC. See OGC/Region V Amicus Brief at 4. We note that the show cause order expressly required IEPA to "show cause as to why it should not be required to issue a federal PSD permit to WSREC * * * in accordance with the rules set forth at 40 C.F.R. part 124," in light of IEPA's representations to the Board that it had identified no PSD deficiencies in WSREC's application. Show Cause Order at 2, 10-11 (emphasis added).

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decision, should a commenter, if the permit is issued as requested by WSREC, seek review before the Board pursuant to 40 C.F.R. § 124.19. Moreover, while IEPA represented to the Board that it identified no PSD deficiencies in WSREC's application, it would have been free to reach a different conclusion prior to actual issuance of a final decision addressing the merits of the PSD application, particularly if the public comments disclosed a potentially relevant issue (as was the case with the alleged siting discrepancy). Thus, while the Board fully supports WSREC's right to a timely PSD permit decision from IEPA, and recognizes the need for these proceedings to be concluded expeditiously, it is important that we ensure that IEPA's decision is grounded in a full and complete public record and is fully consistent with the applicable PSD regulations. As stated nearly two decades ago in another EPA permit proceeding:

The Agency is the representative of the public interest and is not “an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection” at the hands of the Agency. [*quoting Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965) *cert. denied* 384 U.S. 941 (1966).] The courts have made it clear that the Agency must take affirmative steps to obtain the information necessary to sound decisions under the statutes it administers, even at the cost of delay * * *.

In re Public Service Company of New Hampshire, et al., 1 E.A.D. 332, 344 (Adm'r 1977)(NPDES permit); *In re Honolulu Resource Recovery Facility*, 2 E.A.D. 375, n.11 at 379 (Adm'r, 1987)(PSD permit, quoting *In re Public Service Company of New Hampshire, supra*). As the Agency's delegatee, IEPA has a similar responsibility to obtain information necessary to sound decisions.

Accordingly, IEPA is hereby ordered to expeditiously issue a final decision granting or denying WSREC's federal PSD permit application, as well as a response to all significant comments received

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during the public comment period and public hearing with respect to the PSD component of WSREC's application, and an explanation of any changes between the draft and final permit.²⁷ IEPA's response to comments, and any documents cited therein, shall become part of the administrative record for its decision. See 40 C.F.R. §§ 124.15(a), 124.17, & 124.18. The Board expresses no opinion with respect to the substance of the final PSD permit decision to be issued by IEPA. Following issuance of IEPA's final decision, the decision may be appealed to this Board in accordance with the requirements of 40 C.F.R. § 124.19.²⁸

So ordered.

²⁷A recommended time frame for the action ordered herein is discussed *supra* note 3.

²⁸WSREC contends that it will be denied due process if IEPA is given an opportunity to issue a final decision denying WSREC a federal PSD permit. WSREC's Response to OGC/Region V Brief, at 4-5. The appeal procedures of 40 C.F.R. § 124.19 are intended to insure that WSREC is afforded due process in the PSD permit decisionmaking process, and will allow further review of IEPA's decision, if necessary.